MOTION FILED
JUL 1 1983

No. 82-2058

In the Supreme Court of the United States

October Term, 1982

EDGAR D. NELSON, Trading and Doing Business as NELSON HOUSE,

Petitioner

v.

TUSCARORA INTERMEDIATE UNIT NO. 11

MOTION TO INTERVENE AND BRIEF IN OPPOSITION OF THE COMMONWEALTH OF PENNSYLVANIA

LEROY S. ZIMMERMAN
Attorney General
BY: ANDREW S. GORDON
Deputy Attorney General
Counsel of Record
ALLEN C. WARSHAW
Deputy Attorney General
Chief, Special Litigation Section

Office of Attorney General
15th Floor—Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

No. 82-2058

IN THE SUPREME COURT OF THE UNITED STATES

EDGAR D. NELSON, trading and Doing Business as NELSON HOUSE,

Petitioner

v.

TUSCARORA INTERMEDIATE UNIT NO. 11

MOTION OF COMMONWEALTH OF PENNSYLVANIA TO INTERVENE

The Commonwealth of Pennsylvania (Commonwealth), by its Attorney General, LeRoy S. Zimmerman, hereby moves this Court, pursuant to 28 U.S.C. §2403(b), to permit the Commonwealth to intervene in this case as a respondent. In support of this motion, the Commonwealth avers, as follows:

1. In the Petition for Writ of Certiorari filed in this case, petitioner has drawn into question the constitutionality of Pa. Stat. Ann. tit. 24, §§13-1301 and 13-1302 (Purdon 1962 and Supp. 1983), which, taken together, guarantee a free public education to children in the school district in which they reside; a child is deemed to reside in the school district in which his parents or guardian resides.

2. Also challenged on constitutional grounds is Pa. Stat. Ann. tit. 24, §13-1308 (Purdon Supp. 1983), which

imposes upon resident case facilities the obligation to pay public school tuition for children "received from outside Pennsylvania".

3. The respondent, Tuscarora Intermediate Unit No. 11, is not an agency of the Commonwealth.

4. The Commonwealth desires to intervene for the purpose of filing a brief in opposition to certiorari and participating in such further proceedings as this Court should order.

5. The Commonwealth is entitled to intervene by virtue of 28 U.S.C. §2403 (b).

WHEREFORE, the Commonwealth respectfully requests that this Court issue an order permitting the Commonwealth to intervene as a respondent.

Respectfully submitted,

LEROY S. ZIMMERMAN
Attorney General

BY: ANDREW S. GORDON
Deputy Attorney General
Counsel of Record

ALLEN C. WARSHAW
Deputy Attorney General
Chief, Special Litigation Section

Office of Attorney General
15th Floor
Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Dated: July 29, 1983

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA IN OPPOSITION

QUESTIONS PRESENTED

---

1. Whether a residential care facility for children has standing to assert a child's constitutional or statutory rights as a defense to a claim by a local school authority for payment of tuition on behalf of the child for the education of the child in public schools.

2. Whether Pennsylvania statutes which require payment of tuition on behalf of children whose parents reside outside the school district in which the child is attending school violates equal protection or Section 504 of the Rehabilitation Act of 1973 when applied to a retarded child placed in a Pennsylvania residential care facility and whose parents live outside Pennsylvania.

TABLE OF CONTENTS

	PAGE
Motion of Commonwealth of Pennsylvania to Intervene	i
Brief of the Commonwealth of Pennsylvania in opposition:	
Questions Presented	iii
Table of Contents	iv
Opinions Below	1
Jurisdiction	2
Statutes Involved	3
Statement of the Case	5
Argument	7
Conclusion	12

TABLE OF CITATIONS

CASES:

Barrows v. Jackson, 346 U.S. 249 (1953)	8
Bergen v. Bergen, 439 F.2d 1008 (3d Cir. 1971)	10
Doe v. Bolton, 410 U.S. 179 (1973)	8
Griswold v. Connecticut, 381 U.S. 479 (1965)	8
In Re Huck, 435 Pa. 325, 257 A.2d 522 (1969)	10
Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977)	11

Martinez v. Bynum, No. 81-857 (May 2, 1983) 7, 9, 10, 11

NAACP v. Alabama, 357 U.S. 449 (1958) 9

Plyler v. Doe, No. 80-1538 (June 15, 1982) 7, 11

Shiskho v. State Farm Insurance Co., 553 F. Supp. 308 (E.D. Pa. 1982) 10

Singleton v. Wulff, 428 U.S. 106 (1976) 8, 9

Warth v. Seldin, 422 U.S. 490 (1975) 8

CONSTITUTION:

United States Constitution:

Fourteenth Amendment 10

REGULATIONS:

Opinion, Attorney General, No. 69, 1973, 3 Pa. Bulletin, No. 46 (October 27, 1973) 5, 7

22 Pa. Code §§13.11, 13.13, 17.1-17.4 5

STATUTES:

Pa. Stat. Ann. tit. 24:

§§9-951—9-974 5

§13-1302 (Purdon Supp. 1983) 3, 10

§13-1308 (Purdon Supp. 1983) 4, 5, 7

Section 504, Rehabilitation Act of 1973, 29 U.S.C. §794 .....4, 6, 11, 12

No. 82-2058

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

EDGAR D. NELSON, Trading and Doing Business as NELSON HOUSE,

Petitioner

v.

TUSCARORA INTERMEDIATE UNIT NO. 11

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

---

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court (Pet. App. A-1—A-6) is reported at 457 A.2d 1260. The opinion of the Pennsylvania Commonwealth Court (Pet. App. A-7—A-9) is reported at 57 Pa. Commonwealth Ct. 514, 426 A.2d 1234. The opinion of the Court of Common Pleas of Huntingdon County (Pet. App. A-10—A-14) is not reported.

JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on March 16, 1983. The petition for writ of certiorari was filed on June 13, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3).

STATUTES INVOLVED

1. Pa. Stat. Ann. tit. 24, §13-1302 (Purdon Supp. 1983), provides as follows:

> §13-1302. Residence and right to free school privileges
>
> A child shall be considered a resident of the school district in which his parents or the guardian of his person resides. Federal installations are considered a part of the school district or districts in which they are situate and the children residing on such installations shall be counted as resident pupils of the school district. When a resident of any school district keeps in his home a child of school age, not his own, supporting the child gratis as if it were his own, such child shall be entitled to all free school privileges accorded to resident school children of the district, including the right to attend the public high school maintained in such district or in other districts in the same manner as though such child were in fact a resident school child of the district, and shall be subject to all the requirements placed upon resident school children of the district. Before accepting such child as a pupil, the board of school directors of the district may require such resident to file with the secretary of the board a sworn statement that he is a resident of the district, that he is supporting the child gratis, that he will assume all personal obligations for the child relative to school requirements, and that he intends to so keep and support the child continuously and not merely through the school term.

2. Pa. Stat. Ann. tit. 24, §13-1308, provides in pertinent part, as follows:

> If any inmates have been received from outside of Pennsylvania, or if the instiuttion cannot certify as to their residence, their tuition shall be paid by the institution having the care or custody of said children, except in the case of medically indigent children hospitalized in exclusively charitable children's hospitals exempt under section 501 (c) (3) of the Internal Revenue Code which make no charges to any of its patients nor accepts any third-party payments for services provided to any of its patients. In such cases their tuition shall be paid by the Commonwealth out of moneys appropriated by the General Assembly for the purposes of this act. Enrollment of any out of state student in a school district or intermediate unit program shall be conditioned upon a guarantee, or actual advance receipt, of tuition and transportation payment from the institution, from the student's home state or out-of-state school district, or from the out-of-state party or agency which placed the student in the institution. . . .

3. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706 (6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASE

The undisputed facts are summarized in the opinion of the Supreme Court of Pennsylvania (Pet. App. A-1—A-6). The case was commenced by respondent, Tuscarora Intermediate Unit No. 11 (hereinafter "Intermediate Unit"),[1] in the Court of Common Pleas of Huntingdon County, Pennsylvania, against petitioner Edgar D. Nelson, Trading and Doing Business as Nelson House. Nelson House is a state-licensed private residential care facility for mentally retarded children.

In its complaint, the Intermediate Unit sought payment from Nelson House of tuition for the education of Lawrence F. Terwilliger during the 1973-74 school year.[2] The Intermediate Unit based its complaint upon a state statute which requires residential housing facilities to pay the tuition of children who are received by the facilities from outside the state. *See* Pa. Stat. Ann. tit. 24, §13-1308 (Purdon Supp. 1983).[3] Lawrence Terwilliger, whose parents are residents of New Jersey, was transferred

---

[1] Tuscarora Intermediate Unit was described in the complaint as "a municipal corporation." Intermediate units are groups of school districts which have been combined for purposes of providing students residing within the component districts with special education programs. See Pa. Stat. Ann. tit. 24, §§9-951—9-974; 22 Pa. Code §§13.11, 13.13, 17.1-17.4.

[2] The tuition cost for 1973-74 school year was $1,687.09.

[3] The facility is permitted to recover the tuition cost from the child's parents or other person responsible for the child. Op. Pa. Att'y. Gen., No. 69, 1973, 3 Pa. Bulletin No. 461 (October 27, 1973).

to Nelson House from a school in New York. Apparently, there was no residential facility in New Jersey which could suitably house him.

Petitioners claimed in defense that requiring the residential facility to pay for (and presumably pass on to the child's parents) the cost of tuition for children received from out of state violated equal protection and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. The Court of Common Pleas (Pet. Ann. A-10—A-14), the Commonwealth Court (Pet. App. A-7—A-9) and the state Supreme Court (Pet. App. A-1—A-6) each, in turn, rejected these claims.[4] In rejecting petitioner's claim that Pennsylvania's statutory scheme does not discriminate against out-of-state residents, the Supreme Court observed that tuition is charged for all out-of-district residents, regardless of whether the child resides elsewhere in Pennsylvania or in another state (Pet. App. A-5). With respect to the claim under the Rehabilitation Act, that court concluded that petitioner lacked standing to press the claim (Pet. App. A-6).

---

[4] Initially, the case was removed to federal court, but prior to trial it was remanded to state court.

ARGUMENT

1. Petitioners contend (Pet. 8-10), relying upon *Plyler v. Doe*, No. 80-1538 (June 15, 1982), and *Martinez v. Bynum*, No. 81-857 (May 2, 1983), that it was a violation of equal protection for the Intermediate Unit to require Nelson House to pay school tuition for Lawrence Terwilliger. This claim is without merit because Nelson House lacks standing to raise the constitutional issue and because it is not a denial of equal protection for Pennsylvania to require payment for the education of non-resident children.

a. *Plyler* and *Martinez* were cases brought by a guardian and a next friend on behalf of children who either were denied a public school education entirely *(Plyler)* or were required to pay tuition to attend school *(Martinez)*. In this case neither Lawrence Terwilliger nor his parents, or other personal representative is a party. Instead, the party seeking to press the constitutional claim is Nelson House, a residential care facility which, under Pennsylvania law,[5] is responsible for payment of public school tuition for students received from another state.

---

[5] Pa. Stat. Ann. tit. 24, §13-1308 (Purdon Supp. 1983). The state Attorney General has interpreted this provision to require the institution to "make arrangements with the parents for the child's educational expense before accepting the child. If the out-of-state parents refuse to pay the institution, the institution must bear the expense." Op. Att'y. Gen., No. 69, 1973, 3 Pa. Bulletin No. 46 (October 27, 1973). Petitioner never sought to recover the tuition cost from Terwilliger's parents. (Pet. 6).

The essence of petitioner's constitutional claim is that Pennsylvania's tuition requirement, as applied to the facts of this case, violates Terwilliger's right to be treated in the same manner as children who reside in Pennsylvania. But, of course, there is no allegation that petitioner's own constitutional rights have been violated. Presumably, the fact that institutions such as petitioner are denominated by statute as being responsible for the payment of tuition for children received from another state is sufficient to permit petitioner to satisfy the injury in fact requirement of Article III. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975). This conclusion does not settle the standing question.

The Court has designed prudential rules of standing to ensure that only "proper proponents of the particular legal rights" at issue are permitted to press claims. *Singleton v. Wulff*, 428 U.S. 106, 112 (1976). "Ordinarily one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). This rule has the salutory effect of avoiding the unnecessary adjudication of constitutional issues while ensuring that only the best proponents of the constitutional rights are permitted to seek vindication of those rights. *Singleton v. Wulff, supra*, 428 U.S. at 114.

Nevertheless, in narrowly limited circumstances this Court has permitted a litigant to assert the rights of a third party. But those exceptions to the general rule of standing are limited to situations in which the litigant has so close a relationship to the third party as to be as nearly an effective proponent as the third party,[6] or to circumstances in which there is a serious and genuine obstacle to the third

---

[6] *See, e.g., Doe v. Bolton*, 410 U.S. 179 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

party's assertion of his rights.[7] *See Singleton v. Wulff, supra.*

The circumstances of this case do not warrant an exception to the rule that one may assert only his own constitutional rights. Petitioner does not have a close, "confidential" relationship with the child for whom it provided living quarters. Petitioner stands in the position of a merchant providing services to a paying customer. There is no basis for a conclusion that petitioner is "as effective a proponent of the right" as the child. *Singleton v. Wulff, supra,* 428 U.S. at 115.

Likewise, there is no genuine barrier which will prevent children such as Terwilliger from asserting their rights. In fact, the only reason why Terwilliger did not seek relief on his own is petitioner's inexplicable failure to pass on to the child's parents the cost of school tuition. This case hardly presents the type of situation in which this Court has permitted third-party litigation in order to ensure that there exists an avenue for meaningful vindication of important rights. Compare *NAACP v. Alabama,* 357 U.S. 449, 459 (1958) (assertion of right by persons directly affected "would result in nullification of the right at the very moment of its assertion").

For these reasons, petitioner lacks standing to press the constitutional issue.

b. Even assuming that petitioner has standing to raise the constitutional claim, it is plainly without merit. In *Martinez* the Court observed, "We specifically have approved bona fide residence requirements in the field of

---

[7] *See, e.g., NAACP v. Alabama,* 357 U.S. 449 (1958).

public education." Slip op. at 5. The Court went on to note that, "A bona fide residence requirement, appropriately defined and uniformly applied . . . does not violate the Equal Protection Clause of the Fourteenth Amendment." Slip op. at 7.

In determining whether the Texas statute at issue in *Martinez* qualified as an appropriately defined residence requirement, the Court looked to the traditional, common-law concept of residence. The Court determined that a residence requirement which meets the common-law test likewise satisfies constitutional requirements. Slip op. at 10-12.

The common-law rule, both generally and in Pennsylvania, is that a minor's residence or domicile follows that of his parents (or the parent with legal custody). *Bergen v. Bergen*, 439 F.2d 1008 (3d Cir. 1971); *Shishko v. State Farm Insurance Co.*, 553 F. Supp. 308 (E.D. Pa. 1982); *In Re Huck*, 435 Pa. 325, 257 A.2d 522 (1969); Restatement (Second) of Conflict of Laws, §22 and comment a (1971). This is precisely the rule found in the statute at issue here. *See* Pa. Stat. Ann. tit. 24, §13-1302 (Purdon Supp. 1983). Moreover, as this Court observed in *Martinez*:

> At the very least, a school district generally would be justified in requiring school-age children *or their parents* to satisfy the traditional, basic residence criteria—i.e., to live in the district with a bona fide intention of remaining there—before it treated them as residents.

Slip op. at 11 (emphasis supplied; footnote omitted). Accordingly, there is no constitutional objection to Pennsyl-

vania's employment of traditional concepts of residence to define those persons entitled to a free public education.[8]

2. Petitioner's remaining argument (Pet. 10-11) is that Pennsylvania's tuition requirement, as applied to a mentally retarded child such as Lawrence Terwilliger, violates Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. This claim plainly lacks merit.

For many of the same reasons which compel the conclusion that petitioner lacks standing to raise the constitutional issue (see pp. 7-11, *supra*), it also cannot press the Section 504 claim. As the state Supreme Court noted in disposing of petitioner's claim (Pet. App. A-6), it is the handicapped person whom Section 504 is designed to protect and who is in the best position to enforce it. *See Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977).

In any event, Section 504 merely prohibits the denial of benefits to or discrimination against an "otherwise qualified handicapped individual." The state statutes at issue here do not conflict with this prohibition. The statutory scheme merely furthers "the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." *Martinez v. Bynum, supra*, slip op. at 7. Lawrence Terwilliger was not permitted to attend Pennsylvania public schools free because he was a non-resident, not because he was handicapped. Missing from petitioner's Section 504 claim is the crucial element of discrimination based upon handicap.

---

[8] Clearly, *Plyler v. Doe, supra*, does not support petitioner's position. That case merely held that a state cannot discriminate against resident children who are not United States citizens by refusing to permit them to go to local schools for free or otherwise. Here, by contrast, the question is whether a state may deny free education to non-resident students.

For these reasons, petitioner's Section 504 claim must be rejected.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

LEROY S. ZIMMERMAN
Attorney General

By: ANDREW S. GORDON
Deputy Attorney General
Counsel of Record

ALLEN C. WARSHAW
Deputy Attorney General
Chief, Special Litigation Section

Office of Attorney General
15th Floor
Strawberry Square
Harrisburg, PA 17120
(717) 783-1471